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A DEFENCE OF HART'S SEMANTICS AS NONAMBITIOUS CONCEPTUAL ANALYSIS

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Two methodological claims in Hart's *The Concept of Law* have produced perplexity: that it is a book on "analytic jurisprudence"¹ and that it may also be regarded as an essay in "descriptive sociology."² Are these two ideas reconcilable? We know that mere analysis of our legal concepts cannot tell us much about their properties, that is, about the empirical aspect of law. We have learned this from philosophical criticisms of conceptual analysis; yet Hart informs us that analytic jurisprudence can be reconciled with descriptive sociology. The answer to this puzzle lies in the notion of nonambitious conceptual analysis. The theorist analyzes concepts but accepts the limitations of conceptual analysis and therefore uses empirical knowledge and substantive arguments to explain, refine, or perhaps refute initial insights provided by intuitions. This is the conclusion that this paper arrives at as an argumentative strategy to defend Hart's legal theory from the criticisms of Stavropoulos and Dworkin. The latter argues that Hart's legal theory cannot explain theoretical disagreements in law because he relies on a shared criterial semantics. Stavropoulos aims to show that Hart's semantics is committed to ambitious conceptual analysis and relies on the usage of our words as a standard of correctness. Both attacks aim to show that the semantic sting stings Hart's legal theory. This essay refines both challenges and concludes that not even in the light of the most charitable interpretation of these criticisms is Hart's legal theory stung by the semantic sting. This study defends the view that Hart's methodological claims were modest and that he was aware of the limits of conceptual analysis as a philosophical method. He was, this study claims, far ahead of his time.

INTRODUCTION

Dworkin's semantic sting argument³ is one of the most interesting and controversial topics of contemporary legal philosophy. The argument arises as a criticism of Hart's legal theory and states that Hart's legal positivism cannot

*I am grateful to the anonymous referees for their comments. The usual disclaimer applies.

1. H.L.A. Hart, *THE CONCEPT OF LAW* (1994).

2. *Id.*

3. Ronald Dworkin, *LAW'S EMPIRE* 31–46 (1986).

explain theoretical disagreements because it presupposes that participants of a linguistic community possess shared criteria for applying a concept. Therefore if two or more participants, according to this approach, do not share these criteria, they talk at cross-purposes. Dworkin points out that this model of legal disagreement is unsatisfactory since it does not explain the kind of disagreements in which legal participants are commonly engaged. Legal phenomena, therefore, remain unexplained. In law, Dworkin tells us, disagreements arise over different conceptions of a concept. Legal phenomena are recalcitrant on this feature: legal participants might not possess shared criteria. But they do engage in “genuine” legal disagreements. For example, the concept “fairness” might be the subject of a legal disagreement in which the participants do not possess shared criteria for its application. Nevertheless they “genuinely” disagree over whether it is fair to give compensation to a close relative of a victim who suffers psychiatric injury in the aftermath of an accident. These disagreements are not only common within the legal domain but are also common in morality and aesthetics. Thus two art critics might not possess shared criteria for applying the concept “art” but can still have genuine disagreements about whether photography is art. Two or more participants in a discussion might not have shared criteria for applying the concept “good person,” yet they can disagree genuinely on the different conceptions of the concept “good person.” In answer to the question of what kind of disagreements these are, Dworkin replies that they are theoretical disagreements, which means that they are disagreements about different conceptions of a concept. Raz’s response,⁴ by contrast, is that it is not necessary to think in terms of different conceptions of a concept to explain the kind of theoretical disagreements that Dworkin has in mind. He argues that a more sophisticated model of criterial semantic explanations provides a better framework to understand these disagreements. Raz adumbrates the possibility of a model that satisfies all the requirements of a criterial model as attributed to Hart and simultaneously gives a satisfactory explanation of theoretical disagreements.

Coleman has also criticized Dworkin’s view and argues that Dworkin confuses the notion of law in its more general meaning with the notion of the law of a particular community. Thus, while it is true that on a criterial semantics argument two individuals who follow different rules for applying the concept “law” might be assigning different meanings to it, it does not follow that two people who are using two different factual criteria to decide whether a proposition of law is true or false must be assigning different meaning to the concept “law” or that they are employing different concepts.⁵ Defenders of Dworkin such as Stavropoulos⁶ argue that Hart is led by a semantic

4. Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART’S POSTSCRIPTS 1–37 (Jules Coleman, ed., 2001).

5. Jules Coleman, THE PRACTICE OF PRINCIPLE 181 (2001).

6. Nicos Stavropoulos, *Hart’s Semantics*, in HART’S POSTSCRIPTS 59–98 (Jules Coleman, ed., 2001). (hereinafter “HS”).

project and that one of its constitutive elements is "conceptual analysis." Stavropoulos thinks that the key of Hart's conceptual analysis is the notion of shared criteria that can be identified analyzing the usage of our words. His target of attack is not Raz's criterial model or Coleman's criticism; rather it is those who think that Hart did not have a semantic theory in mind at all.⁷

The debate is rich, complex, and crucial to assessing the success or failure of Dworkin's and Hart's legal theories. Stavropoulos attempts to show that Hart relied ambitiously on the notion of conceptual analysis and that, therefore, Dworkin's semantic sting criticism applies successfully to Hart's legal theory.⁸ This paper argues that Stavropoulos fails in his endeavor; the discussion will be presented in the following line of argument: the weaknesses of Stavropoulos's arguments will be made apparent and then a revision of the semantic sting argument, called the semantic properties test argument, will be advanced. The study goes on to show that Hart's conceptual analysis eschews successfully both the former and the latter semantic arguments. In other words, even the most powerful interpretation of Dworkin's semantic sting argument does not weaken Hart's semantics as conceptual analysis. Hart envisaged conceptual analysis as a philosophical method, yet conceptual analysis relies on semantic elements, and two different kinds can be distinguished. First, ambitious conceptual analysis claims that the semantic elements alone are sufficient to understand the nature of our concepts. Second, nonambitious conceptual analysis denies this claim. The discussion shows that Hart's conceptual analysis is nonambitious and therefore that the semantic sting argument cannot sting his legal theory.

Part I of this article discusses Stavropoulos's scrutiny of Hart's semantics and shows the deficiencies of his approach. Part II explains the semantic sting argument and the failure of its application to Hart's semantics as conceptual analysis. It consequently advances the semantic properties test argument as a more powerful interpretation of the semantic sting argument. It might be argued that the semantic sting argument does contain a minimum of truth in claiming that semantics should not be the most important aspect in determining the properties of concepts. The paper demonstrates that if Hart's philosophical method is ambitious conceptual analysis, then his legal theory does fall prey to a new and more sophisticated semantic sting. But the premise fails and the study shows that we can take the venom out of the sting.

7. His target is Timothy Endicott's essay, *Herbert Hart and the Semantic Sting*, in HART'S POSTSCRIPTS 39–58 (Jules Coleman, ed., 2001), in which the author argues that Hart did not advocate either a criterial semantic theory nor any semantic theory at all, if a semantic theory is a general explanatory account of what makes an application of an expression correct.

8. Stavropoulos, HS at 98.

I. CONCEPTUAL ANALYSIS: A PHILOSOPHICAL OUTLOOK

Stavropoulos attributes to Hart a semantic project. Semantics is widely constructed as “theoretical claims regarding the structure and nature of language and the character of concepts.”⁹ It also comprises issues studied under the rubric of philosophy of mind, such as the individuation of thoughts.¹⁰ Stavropoulos argues that Hart relied on semantics in at least two ways; he says, first, that Hart engages in conceptual analysis; and second, that he embraces the doctrine of open texture.¹¹

This paper focuses on Stavropoulos’s first claim. The question of what conceptual analysis is, is already a controversial issue, although there is a set of common features that satisfactorily characterize the notion as a philosophical method that aims to clarify thoughts, concepts, and propositions. The goal of conceptual analysis is to describe or define concepts in terms of other concepts or perhaps to say certain things in one vocabulary in terms of a more fundamental vocabulary, for example, by using physical vocabulary to describe mental states or nonmoral vocabulary to describe moral issues. Conceptual analysis retrieves our intuitions, or what is familiar to us, or the things with which we are acquainted, and organizes them. It uses verbal expressions, such as sentences and words, because this is the only way we can gain access to our concepts and propositions, but it should be noted that the subject of analysis is not the verbal expression itself.¹² It is conceptual and not linguistic analysis. Moreover while conceptual analysis seeks to access our intuitions and ordinary conceptions, the subject matter of the analysis is not our intuitions and acquaintances. Further, word usage can lead to misunderstanding, since the ordinary usage and the technical one can come into conflict.¹³ Conceptual analysis sharpens the usage of our

9. *Id.* at 60.

10. *Id.* at 60.

11. *Id.* at 60.

12. G.E. Moore in his reply to Langford clarifies the point that conceptual analysis is not about verbal expressions. He points out: “Now I think I can say quite definitely that I never intended to use the word in such a way that the analysandum would be a verbal expression. When I talked about analyzing anything, what I have talked of analyzing has always been an idea or concept or proposition, and not a verbal expression; that is to say, if I talked of analyzing a ‘proposition’ in such a sense that no verbal expression (no sentence, for instance) can be a proposition, in that sense.” G.E. Moore, *Reply*, in *THE PHILOSOPHY OF G.E. MOORE* 661 (Arthur Schilpp, ed., 1942). Hart also rejects the idea that analysis is only about “words” and quotes J.L. Austin, *A Plea for Excuses*, 57 *PROCEEDINGS ARISTOTELIAN SOC’Y*, (1956–7) 33–34, in which he says at the end of the passage: “A definition of this familiar type does two things at once. It simultaneously provides a code or formula translating the word into other well-understood terms and locates for us the kind of thing to which the word is used to refer, by indicating the features which it shares in common with a wider family of things and those which marked it off from others of that same family. In searching for and finding such definitions we are looking not merely at words . . . but also at the realities we use words to talk about. We are using a sharpened awareness of words to sharpen our perception of the phenomena.” On the same topic see J.D. Wisdom, *Philosophy, Metaphysics and Psychoanalysis*, in *PHILOSOPHY AND PSYCHOANALYSIS* 251–252 (1953) who is quoted by Hart in *CONCEPT OF LAW* 233 (1994), see notes to p. 4 (hereinafter “CL”).

13. On this matter G.E. Moore argues: “In other words, we may be able to use an expression perfectly correctly without being able to provide a correct philosophical analysis of the

words. Another facet of conceptual analysis is that it is “a priori” because it aims to understand concepts before actual experience. For example, in order to analyze the concept “negligence,” we need to retrieve our intuitions and the familiar notions that we associate with this concept. We then look at the usage of the word “negligence,” because this is a way to gain access to our intuitions about the concept. Thus we might say that “negligence” is connected to the concepts of “duty,” “reasonableness,” and “intentionality.” We might consequently refine the use of the concept “reasonableness” and find it obscure and say that it is better to link the concept “negligence” to the concept of “objective standard of duty.” If we aim to analyze the concept “law,” we must first retrieve our knowledge of it. We know that it is connected to concepts such as “morality,” “rule-governed behavior,” and “obligation”¹⁴ and following this connection may analyze its contextual usage in terms such as “international law” or “primitive law.” The former context is misleading,¹⁵ since users of this concept do not consider that international law is “law,” however, the analysis does reveal that the concept “international law” shares some basic features with the concept “law.” It is apparent then that the actual usage is mistaken.

It can be argued that in traditional conceptual analysis, the result of analysis is an analytic truth such as “all bodies are extended.” Kant defined analytic truths as judgments in which the predicate is part of the subject:

Analytic judgments (affirmative) are therefore those in which the connection of the predicate with the subject is thought through identity. If I say, for instance, “All bodies are extended,” this is an analytic judgment. For I do not require to go beyond the concept which I connect with “body” in order to find extension as bound up with it. To meet with this predicate, I have merely to analyse the concept, that is, to become conscious to myself of the manifold which I always think in that concept.¹⁶

However, analytic truths say nothing about the world; they simply describe the relationship between the terms of a proposition. By contrast, according to Kant, judgments of experience are all synthetic. Kant tell us that the proposition that a body is extended is a priori and is not empirical. However, the judgment “all bodies are heavy” is different from anything that I think in the mere concept of body in general.¹⁷ Critics of conceptual analysis argue that it relies on the truth of the analytic-synthetic dichotomy and object to such a stark distinction. These objections to conceptual analysis were raised

concept or proposition denoted by the expression.” G. E. Moore, *Necessity*, in 9 MIND 289–304, at 290.

14. H.L.A Hart's *CL* begins by saying that these three concepts are interrelated and that this relationship causes perplexity. This perplexity justifies the study of the relationship of these concepts (*CL* at 6–8).

15. Hart, *CL*, at 3–4.

16. I. Kant, *CRITIQUE OF PURE REASON* B11, at 48–49 (Norman Kempf Smith, trans., 1992).

17. *Id.*, B11–12, at 48–49.

mainly by Quine, Kripke, and Hilary Putnam¹⁸ in the sixties and seventies. Some describe a priori truths as conceptual truths on the basis that they are all true in virtue of the nature of the concepts they contain. Jackson, a recent defender of conceptual analysis, has incorporated Quine's, Putnam's and Kripke's criticism¹⁹ of the impossibility of a stark dichotomy between synthetic and analytic truths into his view of conceptual analysis. Jackson's defense of conceptual analysis lies in two core arguments: the argument that we need conceptual analysis to locate the subject matter of our theorizing, and the idea that there is only one kind of necessity although there are two different ways of knowing it, namely "a priori" and "a posteriori." In other words, he rejects the view that the "a posteriori"/"a priori" distinction produces more than one kind of necessity: the necessary "a priori" and the necessary "a posteriori."

Let us scrutinize these arguments. The first argument constitutes the justification of conceptual analysis. Jackson tells us that metaphysics is about what the world is like and that the questions we ask are framed in a language.²⁰ Thus a metaphysician would be unable to engage in serious metaphysics by merely asking questions such as: "Are there Ks?" or "Are Ks nothing over and above Js?" The question of "what counts as a K or a J" is prior to other questions that follow it. The metaphysician first needs to locate or identify the subject matter. According to Jackson, our starting point is our ordinary conception of K or J, and it can be extracted by appealing to our intuitions about possible cases. Let us suppose that I need to extract the ordinary conception of free action; to do this, I appeal to my intuitions about free action. I am thereafter able to describe an action as free because I am guided by my intuitions about various possible cases and can attempt to determine whether there are cases of free action. My intuitions about possible cases reveal my theory of free action, and your intuitions reveal your theory. *To the extent that our intuitions coincide, they reveal our shared theory. To the extent that our intuitions coincide with those of the folk, they reveal the folk theory.*²¹ Jackson makes an important disclaimer concerning the use of the word "concept." The purpose of conceptual analysis is to reach clarity about the cases covered by the words rather than the word per se, and Jackson differentiates conceptual analysis from word or sentence analysis.²² The task that Jackson undertakes is to elucidate concepts by determining how subjects classify possibilities, and he emphasizes that conceptual analysis is an hypothetical-deductive exercise. This can be understood as meaning that

18. In legal theory, Brian Leiter has argued that conceptual analysis in jurisprudence is not immune from Quine's criticism. He claims, however, that analytical jurisprudence theorists have ignored the criticism of the analytic-synthetic distinction. See B. Leiter, *Realism, Positivism and Conceptual Analysis*, in 4 *LEGAL THEORY* 533–547, at 546 (1998).

19. W. Quine *Two Dogmas of Empiricism*, in *CLARITY IS NOT ENOUGH* (H.D. Lewis, ed., 1963); Saul Kripke, *NAMING AND NECESSITY* (1972); Hilary Putnam, *MIND, LANGUAGE AND REALITY* (1975).

20. Frank Jackson, *FROM METAPHYSICS TO ETHICS* 30 (1998) (hereinafter "ME").

21. *Id.* at 32.

22. *Id.* at 33–34.

we are seeking the hypothesis that makes best sense of a person's responses to possible cases, taking into account all the evidence.²³

Jackson's second argument is the idea that there is only one kind of necessity and that the necessary "a posteriori" does not require acknowledging additional kinds of necessity. By contrast, critics of the "a priori" have argued that we might say that $\text{water} = \text{water}$ or $\text{H}_2\text{O} = \text{H}_2\text{O}$ is analytically or conceptually necessary, whereas $\text{water} = \text{H}_2\text{O}$ is metaphysically necessary. This means that there are two kinds of necessity. If this view is sound, then the necessity of water being H_2O is not available a priori, because what is conceptually possible or impossible is available to reason alone, and what is metaphysically possible and impossible cannot be known through reason alone. Therefore, the knowledge that $\text{water} = \text{H}_2\text{O}$ can be achieved only "a posteriori."

Jackson rejects this argument and claims that the necessity of $\text{water} = \text{H}_2\text{O}$ is not different from the necessity that $\text{water} = \text{water}$. His defense lies in two core arguments. First, he advocates an Occamist view and argues that we should not multiply the senses of necessity beyond need.²⁴ Thus the necessary a posteriori can be explained in terms of one unitary notion of a set of possible worlds. Second, he advances the idea of the Twin Earth and states that to describe a counterfactual world, such as the Twin Earth, we need to look at the actual world. Moreover, the actual world plays an important role in determining the correct way to describe counterfactual possible worlds. Let us scrutinize both arguments.

There are two different ways of evaluating linguistic expressions relative to possible worlds. These in turn give rise to different intensions (and different extensions in nonactual worlds). The first way is the original way adopted by possible-world semanticists since the inception of the subject. Given the actual use of an expression—say the use of "water" in the global presence of actual water, that is, H_2O —its intension is just the function assigning an extension to the expression in every possible world considered counterfactually. The extension of the term in a possible world considered counterfactually is what Jackson calls the "C-extension" of the term in that world. And the correlative intension is the "C-intension." Now, it turns out that because of the rigidity of "water," its C-intension is a constant function across water-containing counterfactual worlds in the sense that "water" applies to water, that is, to H_2O , in any such world and otherwise applies to nothing.

The second way of evaluating linguistic expressions relative to possible worlds is to consider possible worlds as actual contexts of use of the expression in question. The basic idea is that we do not consider "water" as used in the actual world and then go on to consider what it applies to in counterfactual worlds, given its actual use. What we do, rather, is consider

23. *Id.* at 36.

24. *Id.* at 70–71.

what “water” applies to as usual in possible worlds considered as actual contexts of use. This generates a different (nonactual) intension.²⁵ For presumably, in any world in which water is used in the global presence of a substance that plays the same role in the interactions of speakers with their environment as H₂O plays in our interactions with ours, “water” will apply to that substance, whatever it is. Given a relevant world x and a relevant substance in that world, the substance in question is what Jackson calls the “A-extension” of “water” in x . And the “A-intension” is just the function from possible worlds, considered as actual contexts of use of “water,” to A-extensions. So in possible worlds considered as actual, “water” will pick out whatever substance in those worlds is relevantly superficially similar to water in the actual world. It will pick out whatever watery substance plays the same role vis-à-vis the everyday interactions of agents with their environment as the role played by water in the actual world.

What has all this to do with conceptual analysis? Suppose we identify concepts with intensions. Conceptual analysis originally sought to uncover the nature of concepts, understood as C-intensions, by revealing their entailment relations with one another. However, as Quine and Putnam have taught us, such an enterprise is hopeless to the extent that it relies on the contentious rendition of the analytic-synthetic distinction. It turns out that C-intensions depend on what the world is actually like, and no amount of analysis can reveal that all on its own. This hopeless project is what Jackson calls “ambitious conceptual analysis.” Nonambitious conceptual analysis begins by identifying concepts with A-intensions. These concepts and their entailment relations do not depend on what the world is like. They depend on the roles things play in agents’ interactions with their environment, the folk theories they happen to uphold, and so on. And Jackson considers conceptual analysis of the nonambitious sort to be both immune from the usual criticisms of traditional conceptual analysis and indispensable to metaphysics.

Jackson also points out that when a term’s A-extension and C-extension differ, there is a difference between the epistemic status of a term’s A-extension and its C-extension. He explains it as follows:

The point is that in order to pick out water in a counterfactual world, we need to know something about relationships between the counterfactual world and the actual world that we could only know after discovering that in the actual world H₂O plays the watery role. By contrast, we did not know the A-extension of water at every world, for its A-extension does not depend on the nature of the actual world. For the A-extension of T at a world w is the extension of T at w given w is the actual world, and so does not depend on whether or not w is in fact the actual world. What we can know independently of what the actual world is like can properly be called *a priori*. The sense in which conceptual analysis involves the *a priori* is that it concerns A-extensions at worlds, and

25. *Id.* at 49.

so A-intensions, and accordingly concerns something that does, or does not, obtain independently of how things actually are.²⁶

Furthermore, Jackson points out that we find our way around buildings by hearing or reading sentences that we understand, such as "The seminar room is around the corner on the left." There are many places and possibilities, but by reading or hearing the sentence and by virtue of understanding it, we know which possibility is actual. He argues that we have a folk theory that ties together understanding, truth, and information about possibilities and that the obvious way to articulate this folk theory is knowing in which possible worlds it is true or false.²⁷ However, he tells us, we understand some sentences without knowing the conditions under which they are true, in one sense of the condition under which they are true.²⁸ He puts the following example: I understand the proposition "He has a beard," but I do not know the truth-conditions of this proposition because I do not know who is being spoken of.²⁹ In other words, we can understand certain sentences by knowing how the proposition expressed depends on context, and it is not necessary to know the sentence's truth-conditions. Jackson asserts that *to know how the proposition expressed depends on context is to know truth-conditions in another sense of a sentence's truth-conditions*.³⁰

Jackson argues that there are two superficially different but essentially identical accounts of the necessary "a posteriori," and he states this as follows:

Thus, we have two superficially different but essentially identical accounts of the necessary *a posteriori*. One says a sentence like $\text{water} = \text{H}_2\text{O}$ gets to be a necessary a posteriori because the proposition it expresses is necessary, but which proposition this is needs to be known in order to understand the sentence, and is an a posteriori matter depending on the nature of the actual world. Little wonder then that it takes empirical work and not just understanding, to see that the proposition expressed and, thereby, the sentence, is [*sic*] necessary. The other says that there are two propositions connected with a sentence like " $\text{water} = \text{H}_2\text{O}$," and the sentence counts as necessary if the C-proposition is necessary, but, as understanding the sentence only requires knowing the A-proposition, little wonder that understanding alone is not enough to see that the sentence is necessary. The important point for us is that both stories can be told in terms of one set of possible worlds.³¹

The former discussion illuminates and clarifies Jackson's distinction between ambitious and nonambitious conceptual analysis. He advocates the idea that fallibility can be reconciled with the "a priori" and that conceptual

26. *Id.* at 51.

27. *Id.* at 71.

28. *Id.* at 72.

29. *Id.* at 73.

30. *Id.* at 75.

31. *Id.* at 77.

analysis should be practiced in its modest or nonambitious role. In other words, analysis about possibilities should not play a big role in determining what the world is like, and thus conceptual analysis cannot determine the fundamental nature of our world. Indeed, on the contrary, conceptual analysis is the activity of describing in less fundamental terms, given an account of the world stated in more fundamental terms.³² This distinction will be elaborated further in the following section.

What is clear is that conceptual analysis is an “a priori” task although this does not mean that the result is not informative. The aim of conceptual analysis is not only to understand but also to explain properties, things, states of affairs, and events in the world. If some of the things said in one vocabulary can be said in another more basic or fundamental vocabulary, then the analyst is given a description in terms of new properties, state of affairs, events, and so on of the concept subject to analysis. Conceptual analysis is, consequently, informational and it should not be, according to Jackson, ambitious.

II. STAVROPOULOS'S APPROACH TO HART'S SEMANTICS AS CONCEPTUAL ANALYSIS

Stavropoulos's characterization of conceptual analysis differs in two ways from the view discussed above. First, he says that conceptual analysis “aims at articulating the existing *common understanding* of the terms whose extension constitutes the field of inquiry”³³. The underlying argument, according to Stavropoulos, is that I need to mean by the words I use what everyone else does; otherwise my substantive claim will miss its target.³⁴ Conceptual analysis, Stavropoulos tells us, is about the explication of the ordinary conception of a concept, and he asserts that this ordinary conception is represented by “folk theory.”³⁵ He also asserts that Hart's analysis aims to fit “folk theory.”³⁶ Second, Stavropoulos, inspired by Jackson, makes an important distinction between ambitious and nonambitious conceptual analysis. According to Stavropoulos, Hart's conceptual analysis is ambitious because it supposes that usage alone determines the correct understanding of concepts.³⁷ According to this view, an analysis is successful “in virtue of its fitting actual usage.”³⁸

I raise a criticism of Stavropoulos's characterization of Hart's semantics as conceptual analysis and argue that either in terms of Jackson's

32. *Id.* at 44.

33. Stavropoulos, *HS* at 70.

34. *Id.* at 71.

35. *Id.*

36. *Id.* at 71–72.

37. *Id.*

38. *Id.*

understanding of ambitious conceptual analysis or in Stavropoulos's terms, Hart's semantics is nonambitious conceptual analysis.

Conceptual analysis, Stavropoulos tells us, is committed "to elucidating the understanding inherent in the ordinary, day-to-day use of the term and reflection about the things it designates."³⁹ To make his point clearer, Stavropoulos claims:

It is not interesting, and perhaps not even sensible, the argument goes, to say that beliefs as I understand the term are neuro-chemical episodes. Rather, for my claim to have any philosophical importance it must be the case that beliefs in the sense common to all thinkers are what I say they are.⁴⁰

At the end of this passage, Stavropoulos quotes Jackson in *From Metaphysics to Ethics*, but Stavropoulos's view differs from the one advanced. Jackson⁴¹ suggests metaphysics is about what the world is like. But, he argues, the questions we ask when we do metaphysics are framed in a language.⁴² He tells us that we would not go very far if we fail to attend to the representational properties of our terms.⁴³ Jackson goes on to argue that arbitrary stipulative definitions—such as that belief is any information-carrying state that causes subjects to utter sentences like "I believe that snow is white"—tend to turn interesting philosophical debates into easy exercises in deductions from stipulative definitions together with accepted facts.⁴⁴ Similarly, the stipulative definition that a belief is a neurochemical episode turns interesting philosophical questions such as the reducibility of mental states to nonmental states into a trivial exercise, since these definitions are not neutral and are therefore theory-laden. Jackson argues that we should resort to our *ordinary conception* of notions like "belief" or "free action" to define our subject *qua* metaphysicians.⁴⁵ Jackson then asks:

But how we should identify our ordinary conception? The only possible answer, I think, is by appeal to what seems to us most obvious and central about free action, determinism, belief, or whatever, as revealed by our intuitions about possible cases. Intuitions about how various cases, including various merely possible cases, are correctly described in terms of free action, determinism, and belief are precisely what reveal our ordinary conception of free action, determinism, and belief, or, as it is often put nowadays, our folk theory of them.⁴⁶

39. *Id.* at 70.

40. *Id.* at 70.

41. Jackson, *ME* at 31.

42. *Id.* at 30.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 31.

According to this passage, our ordinary conception of concepts constitutes our folk theory of them. This is quite different from Stavropoulos's view of folk theory that it is "not the set of actual beliefs about the nature of the things designated by expressions; rather, it is the theory that users, or a subset of them must have, given how they apply the expression in ordinary contexts and in thought experiments."⁴⁷

We need to assess whether Hart's conceptual analysis fits Stavropoulos's characterization of conceptual analysis as being a "folk theory" that is revealed by our word usage. Stavropoulos holds that it will be sufficient if it can be shown that conceptual analysis, according to Hart, is concerned with articulating the understanding implicit in the ordinary use of words of a subset of users such as lawyers.⁴⁸ Moreover, Stavropoulos claims:

Hart treats ordinary use as a source of theoretical knowledge. He thinks, in other words, that attention to use will sharpen our understanding of the concepts that figure in use, and so provide insight into the nature of the things the concepts designate. Moreover, he seems to suggest that collecting the data of use should not be particularly difficult. He says that we can dissolve many persistent problems by looking at how words are ordinarily used. The understanding implicit in use must be manifest, for Hart, in the behavior of users. So the data he has in mind must be widely and easily available, not hidden or requiring substantial theoretical machinery for their retrieval and employment in the service of philosophical explanation. He is after, so to speak, the surface data of ordinary discourse.⁴⁹

In this passage, Stavropoulos is examining Hart's work "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence,"⁵⁰ in which he approves Wittgenstein's dictum that we must look at concepts when they are "at work," not when they are "idling" or on "holiday." This is the only proof used by Stavropoulos to show that Hart advocates the analysis of ordinary discourse. According to Stavropoulos, Hart considers that the actual usage of general terms is guided by implicit principles or rationales that need explicit articulation.⁵¹ The principles that Hart seeks, Stavropoulos tells us, are supposed to reveal the deeper rationale of rules of conventional use.⁵²

Hart often argues that word usage is either misleading or insufficient to understand or explain the nature of legal concepts. Hart tells us that there are three recurrent issues in jurisprudence: How does law differ from, and how is it related to, orders backed by threats? How does legal obligation

47. Stavropoulos, *HS* at 70–71. In this paper, thought experiments, counterfactual situations, and possible cases are taken as being interchangeable.

48. *Id.* at 71.

49. *Id.* at 72.

50. Hart, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 265–277 (1983).

51. Stavropoulos, *HS* at 73.

52. *Id.*

differ from, and how it is related to, moral obligation? What are rules and to what extent is law an affair of rules?⁵³ He then argues that one way to dispel doubts and perplexity about these issues is to resort to a definition through a typical use-based semantics, which provides an analysis of the day-to-day use of the word in question. However, he claims that even expert lawyers find it difficult to give a definition in this form of legal concepts. They *sense* important distinctions between, for example, morality and law, but they cannot explain these distinctions.⁵⁴ Similarly, we recognize an elephant when we see it but cannot resort to our day-to-day use to draw the necessary lines and define it. Hart denies that the purpose of the analysis of legal concepts is to provide a rule by reference to which the correctness of the use of the words can be tested. His interest is in law, coercion, and morality as types of *legal phenomena*,⁵⁵ the purpose of which is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system.⁵⁶ To resort to the usage of words, Hart tell us, in disputes such as that between natural-law lawyers and positivists on the legal responsibility of German officials during the Nazi regime can disguise the nature of the disagreement and is usually verbally ill-presented:

Neither side to the dispute would be content if they were told: "Yes, you are right, the correct way in English (or in German) of putting that sort of point is to say what you have said." So, though the positivists might point to a weight of English usage, showing that there is no contradiction in asserting that a rule of law is too iniquitous to be obeyed, and that it does not follow from the proposition that a rule is too iniquitous to obey that it is not a valid rule of law, their opponents will hardly regard this as disposing of the case. Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage. For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.⁵⁷

Hart emphasizes the usage of words, but the correctness of this depends on the phenomenon to be described or explained. Consequently, for him it is not the case that the phenomenon is correctly explained through a study of the usage of the words. For instance, Hart informs us that the starting point of Austin's analysis is the concept of "being obliged": a gunman orders his victim to hand over his wallet and threatens to shoot him if he refuses, if

53. Hart, *CL* at 13.

54. *Id.* at 13.

55. *Id.* at 17.

56. *Id.* at 17.

57. *Id.* at 204–205.

the victim complies, we say that the victim was “obliged” to do so.⁵⁸ The use of this word is correct because it fits the phenomenon we aim to describe. So as to the main purpose of his book *The Concept of Law*, Hart claims that it is to elucidate the distinction between primary rules of obligation and secondary rules of recognition, change, and adjudication, and the union of the two may be regarded as the “essence” of law though they may not always be found together wherever the word “law” is correctly used. He asserts that their union has a great explanatory power.⁵⁹ Hart tells us that the use of the words “justice” and “morality” might be misleading. These words are used as coextensive. However, in his view, “justice” should have a more prominent place in the criticism of legal arrangements.⁶⁰

Two examples used by Hart to exercise his conceptual analysis and show that word usage cannot help us in the task of elucidating the nature of our legal concepts are worth mentioning. First, he asks whether the common wider usage of the words “international law” is likely to obstruct any practical or theoretical aim.⁶¹ His response is positive. Hart argues that the word “sovereign” is associated with the idea of a person above the law but it is a bad guide to understand the concept of “international law” since it consequently causes confusion in the theory of international law.⁶² Hart then corrects the common usage of the word “sovereign” and argues that it refers instead to “independent,” as in the sentence “a sovereign state is one not subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous.”⁶³

Second, Hart uses conceptual analysis to elicit our intuitions through possible cases, rather than through our word usage, in his explanation of the concept of legitimate legislative authority. He considers the argument that to the extent that participants of a community have the habit of obedience to a rule which comes from a particular authority, we can say that this person or body has an authority to legislate. Hart shows us through possible legal worlds that that habit of obedience to a rule is neither a sufficient nor a necessary condition of legislative authority, and many legal theorists and lawyers agree with Hart’s conceptual analysis of legislative authority because it fits our intuitions about what an authority to legislate is; their agreement is not due to our word usage. Hart imagines a possible legal world in which Rex I’s rules are habitually obeyed and he may, therefore be called a “legislator.” Suppose, however, that a revolution takes place and that society ceases its rule. It may happen during Rex I’s lifetime or at the point of transition to a new Rex II. Consequently, either Rex I will lose or Rex II will not acquire the right to legislate. Hart argues that mere habit is not sufficient to guarantee

58. *Id.* at 6.

59. *Id.* at 151.

60. *Id.* at 153.

61. *Id.* at 209.

62. *Id.* at 216.

63. *Id.* at 217.

Rex II's right to legislate. Therefore there should be a critical reflective attitude to certain patterns of behavior as a common standard, and this should display itself in criticism, demands for conformity, and acknowledgments that such criticism and demands are justified. Hart asserts:

Consideration of the simple legal worlds of Rex I and Rex II is perhaps enough to show that the continuity of legislative authority which characterizes most legal systems depends on that form of social practice which constitutes the acceptance of a rule, and differs, in the ways we have indicated, from the simpler facts of mere habitual obedience. . . . Even if we concede that a person, such as Rex, whose general orders are habitually obeyed, may be called a legislator and his orders laws, habits of obedience to each of a succession of such legislators are not enough to account for the *right* of a successor to succeed and for the consequent continuity in legislative power. First, because habits are not "normative"; they cannot confer rights or authority on anyone. Secondly, because habits of obedience to one individual cannot, though accepted rules can, refer to class or line of future successive legislators as well as to the current legislator, or render obedience to them likely.⁶⁴

This passage shows how Hart makes his case for eliciting our intuitions about legislative authority and how his interest does not merely focus on word usage or on the rationale of conventional rules. You and I do not necessarily agree on shared criteria for applying the concepts of "obedience" or "authority." You and I probably disagree on the criteria for applying the concept "habit" or "obedience." For example, I think that there are examples of "obedience" such as the sacrifice of Abraham to God or Saint Therese to her conscience, but nonetheless you agree on the first and disagree on the latter example. We nevertheless have a fruitful and "genuine" disagreement. Thus the purpose of conceptual analysis, according to Hart, is to reach agreement on our common conception and not on our common usage. In summary, it is possible to conclude that Stavropoulos's arguments are weak and cannot show that Hart relies on usage as the standard of correctness of conceptual analysis. To succeed in his argumentation, Stavropoulos needs to show that the examples above are "really" cases of word usage⁶⁵ rather than cases of eliciting our intuitions and common understanding, although this is a rather difficult task.

However, the core criticism of Stavropoulos's approach is his assertion that Hart's semantics as conceptual analysis is an ambitious one. Stavropoulos's distinction between ambitious and nonambitious conceptual analysis differs from the one advanced by Jackson, who claims that modest conceptual analysis should prevail. According to Stavropoulos, Hart's conceptual

64. *Id.* at 58.

65. Our interpretation is consistent with similar ideas advocated by authors such as Coleman. He claims that Hart's aim is not to report on usage, but to analyze the concept of law. See Coleman, *supra* note 5, at 177).

analysis is ambitious because it presupposes that use alone determines the correct understanding of the target concept.⁶⁶ This means that analysis is true in virtue of its fitting actual usage.⁶⁷ Moreover, “ambitious analysis seeks to articulate a standard to which ordinary use is responsible, which is drawn from ordinary use. Such a standard is supposed to be derived from the data of actual usage—the applications of the expression made by ordinary users, the explications of its meaning offered by them and the procedure and abilities of users.”⁶⁸ But ambitious analysis also aspires to order usage on the basis of a common ground, which is constructed as an idealization. Thus ambitious analysis seeks coherence in words’ usage and for its correctness does not need something independent of their use.⁶⁹ The applications most users are disposed to make and the judgments of application on which most agree “*are secure from discounting.*”⁷⁰ According to Stavropoulos, Hart’s analysis respects actual usage and therefore it accepts the judgments that are firmly in place and widely shared, and the more prevalent applications, defining status. Stavropoulos tells us that this common ground as a benchmark of correctness commits Hart’s analysis to the idea of shared criteria:

Ambitious analysis, therefore, uses the common ground as a benchmark of correctness, on the basis of which individual mistake, irrespective of its sources and character—whether the result of incomplete understanding or general epistemic handicap—is defined as such. Given that the common ground is the standard of correctness, ambitious analysis is committed to there being and to its aiming at articulating shared criteria, i.e., the procedures and rules shared among users and used for supporting their judgments of application of the term.⁷¹

Thus Stavropoulos suggests that if I disagree on the meaning of the word “obligation” and most other users agree on it, then I will be treated as being confused. Ambitious analysis, consequently, precludes a further and interesting possibility, namely that instead of having a defective understanding of “obligation,” my concept of obligation is the result of an unorthodox theory of what obligation really is.⁷² It therefore precludes theoretical disagreements, which means the possibility of individuals having different conceptions of a concept.

Since we have shown that Hart did not merely rely on the primacy of word usage in analyzing legal concepts, it follows that Hart’s semantics, as conceptual analysis, cannot be characterized as ambitious in the way described

66. Stavropoulos, *HS* at 72–73.

67. *Id.*

68. *Id.* at 74.

69. *Id.*

70. *Id.* at 75.

71. *Id.*

72. *Id.* at 79.

by Stavropoulos. Hart argues that a mere habit of obedience cannot explain legislative authority, because a possible case—Rex I and Rex II—has shown that the habit of obeying the law or the law of a particular authority cannot guarantee the right to legislate to successive authorities. The basis of Hart's arguments is not common users' rules and procedures. Instead he appeals to our common intuitions about "authority," "obedience," and the "right to legislate." We agree with Hart because his explanation is powerful and fits our intuitions, together with the fact that we accept that rules have an internal aspect which is constituted by a critical reflective attitude. We reckon that habit is not sufficient to define authority because habit is not a normative concept, and if you disagree with me and argue that habit is a normative concept, then you need to provide possible cases to make me aware of the kind of intuitions that you wish to make apparent and which may contradict my former insights. In other words, we seek clarification of our concepts in order to reach a common explanation of legal phenomena. The key issue is whether we think that our intuitions alone can determine the nature of our concepts. This is, according to Jackson's view, ambitious conceptual analysis.

Jackson's notion of conceptual analysis differs substantively from that of Stavropoulos since it is both much more interesting and rich and can constitute a powerful criticism of Hart's semantics as conceptual analysis. Conceptual analysis has an immodest role, because Moorean facts—our intuitions—and our folk theory carry an important weight in an argument on the nature of the world. However, Jackson criticizes conceptual analysis in its immodest role on the ground that it gives intuitions about possibilities too much significance in determining what the world is like.⁷³

Let us, for instance, consider the concept of "justice." Our intuitions tell us that justice requires *inter alia* that like cases should, *prima facie*, be treated alike. Conceptual analysis in its modest role considers that the question about the resemblances and differences applying to the general principle of justice is a substantive matter. This means that the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society. It must then require substantive arguments to show that if, for example, a law provides for the relief of poverty, the requirement of the principle "to treat like cases alike" necessitates attention to the needs of different claimants of relief. Sometimes what are required are the capacities of persons for a specific function with which the exercise of the law in question may be concerned.⁷⁴ The claim is that "a priori," given the conceptual analysis of the concept "justice," "like cases should be treated alike." It is a matter of substantive argument to give content to this principle. The matter of content is, therefore, an "a posteriori" issue.

73. Jackson, *ME* at 43–44.

74. Hart, *CL* at 159.

By contrast, conceptual analysis in its immodest role argues that the principle “to treat like cases alike” really should be defined “a priori,” eliciting our intuitions of what justice really requires. It is claimed here that Hart advocates conceptual analysis in its modest role. Thus he argues that analysis of the concept of justice is complex. Conceptual analysis, Hart tells us, of the concept of justice is much more complex than the analysis of concepts such as “genuine,” “tall,” or “warm,”⁷⁵ because the standard of relevant resemblance between different cases not only varies with the type of subject, “but may be often open to challenge even in relation to a single type of subject.”⁷⁶ Thus we might all agree that justice means the requirement that like cases be treated alike, but there are resemblances and differences among individuals that the law must recognize if its rules are to treat like cases alike and so be just. “Fundamental differences, in general moral and political outlook, may lead to irreconcilable differences and disagreements as to what characteristics of human beings are to be taken as relevant to the criticism of law as unjust.”⁷⁷ Here conceptual analysis cannot help us, and only substantive arguments can defend one view in favor of another.

As stated in the introduction to this piece, two methodological claims in the *Concept of Law* have produced perplexity: that it is a book on “analytic jurisprudence,” and that it may also be regarded as an essay in “descriptive sociology.” Are the two ideas of conceptual analysis and descriptive sociology reconcilable? The answer to this puzzle lies, I claim, in the notion of nonambitious conceptual analysis. The theorist analyzes concepts but accepts the limitations of conceptual analysis and therefore uses empirical knowledge and substantive arguments to explain, refine, or perhaps refute initial insights provided by intuitions. He makes “a priori” claims about the relationships between legal concepts such as “law,” “rule-governed behavior,” and “morality,” then he considers substantive arguments to refine and organize these conceptual associations. Jackson calls this methodology “analytical descriptivism” to distinguish it from other descriptivist tasks in normative fields such as ethical naturalism, where conceptual analysis is rejected and replaced by naturalized epistemology.⁷⁸ Perhaps we should call Hart’s methodology analytical legal descriptivism.

75. It is arguable, against Hart’s view, that he cannot justify the idea that empirical concepts are less complex than concepts such as “justice.” However, it can be argued that it is easier to reach agreement on what is “warm” or “tall” in controversial cases than on what is “just” in contestable cases.

76. Hart, *CL* at 156.

77. *Id.* at 157.

78. Brian Leiter uses naturalized epistemology as a methodology for jurisprudence. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. (1997). My article, *Genuine Disagreements: A Realist Reconstruction of Dworkin*, 4 OXFORD JOURNAL OF LEGAL STUDIES (2001), resorts to naturalized epistemology to reconstruct Dworkin’s legal theory in realist terms.

III. A CHARITABLE INTERPRETATION OF THE SEMANTIC STING ARGUMENT: THE SEMANTIC PROPERTIES TEST

Stavropoulos delineates the argumentative route that is needed for a full defence of the semantic sting argument. Dworkin and his rejoinders must show that Hart's semantics theory advocates shared criteria for applying a concept. They must then clarify concepts of "shared" and "criteria" and show that Hart's semantics advocates these claims whatever content they might have. This task, for reasons already pointed to, is not simple. Hart's semantics as conceptual analysis does not presuppose the notion of "shared criteria" and therefore, if Stavropoulos's purpose is to show that Hart's semantics as conceptual analysis makes his legal theory vulnerable to the semantic sting argument, Stavropoulos has failed for the reasons exposed above.

There is, however, an important methodological intuition in Dworkin's semantic sting argument which proves insightful when inserted into a sound theoretical framework. It is argued that Dworkin's intuition is that semantics, the study of the relationship between our language and the world, should not determine the properties⁷⁹ of our concepts.⁸⁰ Consequently, it is possible to have genuine disagreements about the nature or the properties of our concepts without having "shared criteria." This assertion will be clarified in the following paragraphs. Thus it is proposed that the semantic sting argument will be refined in the light of what is called the semantic properties test argument, an argument that preserves the spirit of the semantic sting argument. However, it is a more powerful theoretical framework than the semantic sting argument, relying not on notions such as "shared criteria" but instead on the idea of a traditional theory of meaning in which the meaning of our words is the set of properties that a competent speaker associates with the term.

Of course, to define a competent speaker we need to assume that the set of properties that the speaker has identified is, in principle, identifiable by any other competent speaker. For example, a speaker is defined as competent because there is a set of properties, such as dangerous and animal, that he associates with the term "tiger." This is done "a priori," since it is not necessary to have the experience of a tiger to understand the set of properties that applies to the term. As Jackson points out, we can learn to identify a tiger through examples of what is not a tiger. Subsequently, "shared" properties might be an important condition to assess competence, but they are not

79. I have argued in *Genuine Disagreements* (supra note 78) that a realist reconstruction of Dworkin's legal theory is a way of making sense of the distinction between theoretical and semantic disagreements to eschew the criticism of semantic sophisticated models such as the one advanced by Raz in *Two Views of the Nature of the Theory of Law*, see supra note 4. Realism argues that ontological issues should be settled prior to semantical issues. I also argue, however, that Dworkin's reconstruction is incompatible with his ametaphysical view advocated in *Truth and Objectivity: You'd Better Believe It*, PHIL. & PUB. AFF 25(2) (1996).

80. The notion of "properties of our concepts" refers to the features of the world that are represented by the concept. It appeals to the representational function of concepts.

necessarily so. One speaker might associate the term “good person” with the property of “being generous,” and another speaker might not be able to think of any property to identify the term “good person,” although he can think of the life of Jesus as a good example and therefore infer that the property of “humility” is applicable to the term. The two speakers do not have “shared” properties or criteria but they can identify the concept in virtue of a set of properties of what the concept is about.⁸¹ This interpretation is consistent with Hart’s semantics as conceptual analysis.

Second, the semantic-properties-test argument asserts that an analysis of the meaning of words enables us to determine the properties of our concepts. Synonymy or paraphrasing⁸² is used to show how certain terms such as “law” are related to other terms such as “rule-governed,” and how, as a result, these concepts have coextensive properties. Therefore, via conceptual analysis—through verbal expressions—we elicit our intuitions about two different concepts and reveal that they are clearly related. We now know that we can describe the concept “law” in terms of the concept “rule-governed” and we can say with certainty that the properties of the concept “law” are coextensive with the properties of the concept “rule-governed.” This is the semantic test of properties. It uses semantics, for example conceptual analysis, to determine what properties are in the world and it is “a priori” since it does not require actual experience or substantive argument to elucidate the concept.

The objection to this view is as follows: if a theorist advocates the idea that in order to determine the meaning of a term there must be a set of properties that any competent speaker associates with it, he has to abandon conceptual analysis, for the reason that an analysis of our terms does not give us any information about the properties of our concepts. On the other hand, if the theorist aims to preserve conceptual analysis, he needs to abandon this theory of meaning. A corollary of this view is a different version of the semantic sting argument: here, even when two speakers identify a set of properties associated with a term, conceptual analysis cannot tell us anything about the properties of the two related concepts and the two speakers can still have substantive disagreements about the properties or nature of the concepts. For example, one speaker associates the term “law” with “the set of norms emanating from a state,” and another competent speaker associates “law” with “a norm that is just.” After having applied conceptual analysis, we consider that “law” is associated with “rule-governed behavior” and “obligation.” Consequently, according to the semantic properties test argument, “rule-governed behavior” and “obligation” have coexisting properties.

The objection to this is that only substantive arguments can show that “law” and “obligation” have the same properties or nature and that, therefore, an

81. See Raz, *supra* note 4, for a discussion of criterial semantic explanations that do not presuppose the notion of “shared criteria.”

82. Jackson in *ME* argues that conceptual analysis is more about paraphrasing in the Quinean sense than about synonymy.

"a priori" analysis such as conceptual analysis cannot tell us the properties of our concepts. It is argued here, however, that the kind of disagreement that the conceptual analyst has is merely a semantic disagreement. This theorist assumes that conceptual analysis throws light on the properties of concepts, but this is a mistake. It cannot be done, runs the objection, because what Kripke's and Putnam's model has shown is that descriptions of our terms cannot determine the reference of our concepts. Thus, in both the Twin Earth and the actual Earth the use and description of the term "water" is potable and odorless liquid. However, in the Twin Earth water is XYZ, whereas in the actual Earth water is H₂O. Descriptions that are subjected to conceptual analysis cannot determine the reference of our concepts. Consequently only "a posteriori" arguments and discovery can reveal our concepts. This objection is the semantic-properties-test argument.⁸³

According to this revision of the semantic sting argument, we can have "genuine" theoretical disagreements or substantive disagreements without having a set of properties or criteria that applies to the concept. For instance, we might not share a set of properties for applying the concept "art" but we still have genuine disagreements about what is the nature of the concept "art." To associate "a priori" through conceptual analysis the term "art" with "internal expression," for example, assumes that these two terms have coextensive properties. But substantive arguments, namely an "a posteriori" inquiry, may reveal that there is no such neutral⁸⁴ link and moreover that this association reveals a modern theoretical conception of the concept "art."⁸⁵

IV. HART, CONCEPTUAL ANALYSIS, AND THE STING: A NONAMBITIOUS PROJECT

In the last section of this paper, let us attempt a defence of Hart's semantics as conceptual analysis using the semantic-properties-test argument. The paper has so far argued that Hart's analysis aims to clarify and understand legal concepts but does not rely on our intuitions alone. On the contrary, Hart's analysis raises substantive arguments to explain the nature of legal concepts and therefore represents a conceptual analysis in its modest role.

83. David Brink, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 160–161 (1989) gives a detailed formulation of the semantic-properties-test argument. It is a variation of Moore's open argument in *PRINCIPIA ETHICA*. It is also well explained in Harman, *THE NATURE OF MORALITY, AN INTRODUCTION TO ETHICS* (1977).

84. Hart in his reply to J. Cohen in "*Theory and Definition in Jurisprudence*," In: *Proceedings of the Aristotelian Society*, xxix (1955): 238, focuses on the importance of being neutral with respect to different theoretical views.

85. Charles Taylor in *THE SOURCES OF THE SELF* (Cambridge, Harvard Univ. Press, 1989), argues that the modern turn towards an inner self, which began with St. Augustine, followed by Descartes and Locke, explains the contemporary conception of art as a form of self-expression. It is arguable, therefore, that "art" is not a neutral concept but that its definition depends on the conception or theoretical framework presupposed by the theorist. Therefore the concept "art" or "morality" is the result of fragmented conceptual frameworks. Nowadays this latter radical assertion is seen as a commonplace in philosophical discussions.

This argument ensures a plausible defence of Hart's legal theory against the semantic-properties-test argument.

As stated previously, Jackson's approach to nonambitious conceptual analysis incorporates Quine's⁸⁶ and Kripke's⁸⁷ criticism of conceptual analysis. According to Quine, conceptual analysis presupposes a clear dichotomy between analytic and synthetic truths. Quine has argued that this is a false dichotomy. It is not possible to give a total description of the world independently of our language or conceptual schemes. Nonetheless, conceptual analysis in its modest role does allow us to agree with Quine.⁸⁸ Jackson claims that the key issue in the analysis of our terms is not whether the terms are synonymous but rather what Quine has called "paraphrasing," namely whether they give an "approximate fulfilment of the likely purposes of the original sentences."⁸⁹ Take, for example, the concept of personal identity. If we appeal to our intuitions, we are likely to propose that the concept "I" or "myself" is different from "I" or "myself" as having causal continuity in space and time. Locke has criticized our intuitions on this respect. Consequently, it is necessary to formulate a concept of personal identity that fits our substantive descriptions of "I," such as "I will be punished," "I should be punished," "I deserve this award," and so on. Nonambitious conceptual analysis accepts that our intuitions can be wrong.

Consider the analysis of the concept "socialism." The concept is subject to differences in America and in Europe. However, substantive research on the concept "socialism" is likely to bring to light key elements that should correct our "a priori" judgments about these differences. Consider, in addition, the case of "legislative authority." Conceptual analysis tells us that to have legislative authority a reflective critical attitude to the norm is required. However, let us suppose that substantive arguments show that this reflective critical attitude is an evaluative point of view. Thus we may correct our notion of legislative authority and argue that an evaluative critical point of view is what is required to have "legislative authority." But how do "a priori" and "being fallible" coexist? As we explained in the previous section, Jackson argues that if a term applies in a given world *w*, given or under the supposition that *w* is the actual world, then we call this the "A-extension" and the function assigning to each world the A-extension of terms in that world is called the "A-intension" of the term. By contrast, if we refer to possible worlds, then the extension of the term is "C-extension" and the intension of the term in counterfactual worlds is "C-intension." We learned from Kripke that for a term such as "water," the C-intension is not the same as the A-intension, whereas for words such as "square," the A-intension is the same as the C-intension. According to Jackson, we also learn from Kripke that in

86. See Quine, *supra* note 19.

87. See Kripke, *supra* note 19.

88. Jackson, *ME* at 44.

89. *Id.* at 45.

order to know something about the C-extension, we need to know about the actual world:

The point is not that we did not know the essence of water—we rarely know the essence of the things our words denote; the point is that in order to pick out water in the counterfactual world, we need to know something about relationships between the counterfactual world and the actual world that we could only know after discovering that in the actual world H_2O plays the watery role.⁹⁰

By contrast, knowledge of the A-extension does not depend on the nature of the actual world. What we know independently of knowing what the actual world is like can properly be called “a priori.” Conceptual analysis has two “a priori” parts. First, the part concerned with the A-intensions of various terms, and second the part concerned with whether the A-intensions and the C-intensions of various terms differ.⁹¹

In his criticism of the analytic-synthetic dichotomy, Quine asserts that there are no genuinely analytical “a priori” sentences. Jackson argues that the use of language and the ability to express how things are require representational devices which effect a partition among possibilities in the world. According to Quine, we can never detach our conceptual schemes and how things are. Mooreans, by contrast, tell us that we can effect a partition between language and thought,⁹² and conceptual analysis adheres to the notion that we are able to distinguish between what is very confidently believed and that which our confident belief is about. According to conceptual analysis, our starting point is our way of describing things and our knowledge of what is familiar to us and consequently we are able to reject certain fantastic possibilities and can assert that our ordinary conception of “law” is revealed by our intuitions. This is not to assert that these boundaries cannot be moved. On the contrary, it has been shown that substantive arguments should play a role in the correcting of these intuitions.

Hart's *Concept of Law* is, I claim, an example of nonambitious conceptual analysis. It can be defined as conceptual analysis because Hart aims to clarify our concepts, because these concepts have representational properties,⁹³

90. *Id.* at 50.

91. *Id.* at 52.

92. *Id.* at 52–55.

93. This is an important point that Stavropoulos misses. He asserts that Hart's semantics has metaphysical consequences (*HS* at 64) that introduce a tension since “on the one hand, Hart professes to seek metaphysical insight from the way words are used; on the other, he says that the rules governing use will not take us far enough in the metaphysical inquiry” (*HS* at 69). Stavropoulos overlooks the fact that it is not our word usage that enables us to understand the metaphysical consequences of our language, it is instead the representational properties of our words. Consequently, there is no such tension in Hart. Stavropoulos points out that according to Hart, inquiry in use-based semantics will not take us far enough; we need to look at the things, events, or state of affairs represented by our language. However, it is doubtful whether these things, events, or state of affairs do have, according to Hart, a robust metaphysical status.

and because they tell us what is covered by the concept.⁹⁴ Similar concepts have similar vocabularies because they designate things or events with common features.⁹⁵ The structure of our thought and language, and therefore the way we describe the world and each other, reflects truths about human nature, such as the instinct of self-preservation.⁹⁶ Conceptual analysis also shows that the existence of differences between social phenomena such as mere convergence of behavior and social rules can be shown linguistically.⁹⁷ Hart asserts that general terms are used to classify both features of human life and the world in which we live⁹⁸ and he informs us that we are not looking merely at words but at the realities we use words to talk about.⁹⁹ He aims at understanding the relationships between one type of phenomena to which we apply words and other types of phenomena.¹⁰⁰ Hart insists that what is required is a description of how a statement of the form "X has a right . . ." is related to facts and to legal rules.¹⁰¹ However, Hart's conceptual analysis does not claim that a mere understanding of our concepts "a priori" will ensure an understanding of the phenomena; in other words, that a mere analysis of our concepts will cast light on the properties of our concepts. Therefore, we assert, Hart's conceptual analysis is nonambitious.

Three examples shall well illustrate the point. First, Hart rejects the idea that the nature of international law can be inferred "a priori" from the concept of sovereignty of the state. He argues that we need to examine the actual rules and points out: "there is no way of knowing what sovereignty states have, till we know what are the forms of international law and whether or not they are mere empty forms."¹⁰² Second, Hart's reply to skeptical views that claim that sanctions are a necessary condition of municipal systems and a fortiori they are also a necessary condition of international law is that there are substantive arguments to defend the idea that sanctions do not play a central role in characterizing international law and therefore no simple deduction can be made from the concept of municipal law to the central features of international law:

This is so because aggression between states is very unlike that between individuals. To initiate a war is, even for the strongest power, to risk much for an outcome which is rarely predictable with reasonable confidence. On the other hand, because of the inequality of the states, there can be no standing

Hart insists, in the CONCEPT OF LAW, on evading metaethical or metaphysical formulations due to the difficulties and subtleties involved in these issues. (CL at 164).

94. Hart, CL at 168.

95. *Id.* at 168.

96. *Id.* at 188.

97. *Id.* at 9.

98. *Id.* at 4.

99. *Id.* at 14.

100. *Id.*

101. Hart, "Theory and Definition in Jurisprudence," *see supra*, note 84 at 246.

102. Hart, CL at 218.

assurance that the combined strength of those on the side of international order is likely to preponderate over the powers tempted to aggression. Hence the organization and use of sanctions may involve fearful risks and the threat of them add little to the natural deterrents. Against this very different background of fact, international law has developed in a form different from that of municipal law. When the rules are disregarded, it is not on the footing that they are not "binding" instead efforts are made to conceal the facts. It may of course be said that such rules are efficacious only so far as they concern issues over which states are unwilling to fight. This may be so, and may reflect adversely on the importance of the system and its value to humanity. Yet that even so much may be secured shows that no simple deduction can be made from the necessity of organized sanctions to municipal law, in its setting of physical and psychological facts, to the conclusion that without them international law, in its very different setting, imposes no obligation, is not "binding," and so not worth the title of "law."¹⁰³

Third, Hart argues that the "a priori" claim that states can be bound only by self-imposed obligations has too little respect for facts. He suggests that only an empirical research of the actual practice of states can show which view is the correct one.¹⁰⁴ He gives two examples in which international obligations arise though there is no consent of the party bound. The first is the case of a new state, such as Iraq in 1932 and Israel in 1948. After emergence, both states were bound by the general obligations of international law. The second case is that of a state acquiring territory or undergoing change, such as the acquisition of maritime territory, where the state is subject to rules relating to territorial waters and the high seas.¹⁰⁵

CONCLUSION

This study has argued that Hart's semantics does not fall prey to the semantic sting argument, which is one of the most important challenges to Hart's legal theory advanced by Dworkin. We have scrutinized Stavropoulos's arguments, which aim to strength Dworkin's view by claiming that Hart's semantics involves shared criteria for applying a concept and relies on a use-based semantics. According to Hart, our ordinary conception is revealed by our words' usage. Yet it is argued that Stavropoulos conflates ordinary conception and ordinary usage. On the other hand, it is apparent, in opposition to Stavropoulos's view, that Hart's conceptual analysis is nonambitious, which means that it relies neither on words' usage nor on an "a priori" analysis of our concepts alone to determine their properties. Undertaking the challenge of the semantic sting argument, the paper offers a charitable interpretation of this argument, which is called the semantic-properties-test

103. *Id.* at 214–215.

104. *Id.* at 220.

105. *Id.* at 221.

argument. It is shown, however, that Hart can successfully eschew this latter criticism. Hart's conceptual analysis as nonambitious ensures that no sting can sting his legal theory. This study defends the view that Hart's methodological claims were rather modest and that he was aware of the limits of conceptual analysis as a philosophical method. He was far ahead of his time.